

REMARKS

Applicants have reviewed this application in light of the Office Action mailed November 17, 2008. Claims 1, 5-13, 16-20, 22 and 23 are pending in this Application. Claims 1, 5-13, 16-20, 22 and 23 were rejected. Claims 1, 10, and 17 are amended herein. Claims 2-4, 14-15, and 21 were previously cancelled without prejudice or disclaimer. Applicants respectfully request reconsideration and allowance of all pending.

Rejections under 35 U.S.C. §103

Claims 1, 5-13, 16-20, 22 and 23 were rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 6,718,486 issued to Drew Shaffer Roselli et al. (“*Roselli*”) in view of U.S. Patent Application Publication No. (2003/0158940 by Kevin B. Leigh (“*Leigh*”), and further in view of U.S. Patent 6,799,208 issued to Mukund Sankaranarayan et al. (“*Sankaranarayan*”). Per telephone conference with Examiner on November 21, 2008, all references to “Forrest” in the Office Action refer to *Sankaranarayan*.

Applicants respectfully traverse and submit the cited art combination, even if proper, which Applicants do not concede, does not render the claimed embodiment of the invention obvious.

In order to establish a prima facie case of obviousness, the references cited by the Examiner must disclose all claimed limitations. *In re Royka*, 490 F.2d 981, 180 U.S.P.Q. 580 (C.C.P.A. 1974). Even if each limitation is disclosed in a combination of references, however, a claim composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art. *KSR Int’l. Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1741 (2007). Rather, the Examiner must identify an apparent reason to combine the known elements in the fashion claimed. *Id.* “Rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *Id.*, citing *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006). Finally, the reason must be free of the distortion caused by hindsight bias and may not rely on ex post reasoning. *KSR*, 127 S.Ct. at 1742. In addition, evidence that such a combination was uniquely challenging or difficult tends to show that a claim was not obvious. *Leapfrog Enterprises, Inc. v. Fisher-Price, Inc. and Mattel, Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007), citing *KSR*, 127 S.Ct. at 1741.

The cited references *Roselli*, *Leigh*, and *Sankaranarayan* fail to teach the elements recited in Applicants' amended claims. For example, the Examiner acknowledges that *Roselli* and *Leigh* fail to teach the following elements of Claim 1:

calculating a new second calendar schedule for the fail-over node application processing operations based on results from application of the resource negotiation algorithm, the new second calendar schedule providing a reduced operating state for at least a portion of the failing-over application processing operations.

But the Examiner alleges that *Sankaranarayan* does teach these elements, at col. 9, line 63 to col. 10, line 9; and col. 14, lines 20-40. (Office Action, page 5). However, these cited portions of *Sankaranarayan* do not teach these elements. The cited portions disclose a resource manager 102 able to dynamically change from an application from one configuration to another as operating conditions change. "For instance, if resources are needed elsewhere by a higher priority application, the current application may be asked to use a less preferred or "fallback" configuration that enables the needed resources to be reallocated to the higher priority application." (col. 9, line 63 to col. 10, line 3). The resource management architecture is able to migrate desired, but limited, resources away from the less important activities to the more important activities. (col. 14, lines 19-22). For example, the resource manager effectively "preempts" the lower priority activity that is currently using the resources and dynamically shifts the resources to the higher priority activity. (col. 14, lines 32-35).

Thus, the cited portions of *Sankaranarayan* teach a resource manager operable to dynamically change the configuration of a lower priority application to a less preferred or "fallback" configuration, in order to enable needed resources to be reallocated to a higher priority application. Even if this dynamic configuration change to a less preferred or "fallback" configuration for an application could be equated with "providing a reduced operating state" for the application, there is no teaching in *Sankaranarayan* of utilizing such dynamic configuration change *for a failing-over application* being reallocated to a fail-over node in response to a fail-over event. Thus, *Sankaranarayan* fails to teach "... providing a reduced operating state for at least a portion of the failing-over application processing operations" as recited in Claim 1.

Further, even if *Sankaranarayan* did teach providing a reduced operating state for a failing-over application (which it does not, as discussed above), *Sankaranarayan* does not teach “calculating a new second calendar schedule for the fail-over node application processing operations ... the new second calendar schedule providing a reduced operating state for at least a portion of the failing-over application processing operations.” *Sankaranarayan* teaches nothing about *calculating a calendar schedule* that provides a reduced operating state for a failing-over application, much less calculating a *new* calendar schedule, *i.e.*, after a first calendar schedule was calculated and determined to be unsuitable.

For at least these reasons, Applicants submit that Claim 1 as previously recited is allowable over *Roselli*, *Leigh*, and *Sankaranarayan*.

However, in order to even further distinguish Claim 1 from the cited references, Applicants have amended Claim 1 to recite:

calculating a new second calendar schedule for the fail-over node application processing operations based on results from application of the resource negotiation algorithm, the new second calendar schedule providing a reduced operating state for at least a portion of the failing-over application processing operations, but not reducing the operating state for any existing fail-over cluster node application processing operations

Sankaranarayan clearly does not teach this amended feature. Even if *Sankaranarayan* did teach “calculating a new second calendar schedule for the fail-over node application processing operations ... the new second calendar schedule providing a reduced operating state for at least a portion of the failing-over application processing operations” (which it does not, as discussed above), *Sankaranarayan* would still fail to teach *selectively reducing the operating state* of applications based on whether the applications are (a) failing-over applications from a failing-over node or (b) existing applications of the fail-over node. There is no discussion of any distinction between failing-over applications from a failing-over node and existing applications of a fail-over node in *Sankaranarayan*, much less selectively reducing the operating state of applications based on such distinction.

For at least these reasons, Applicants respectfully request reconsideration and allowance of amended Claim 1, as well as all claims that depend therefrom. In addition, for analogous reasons, Applicants respectfully request reconsideration and allowance of amended independent Claims 10 and 17, as well as all claims that depend therefrom.

CONCLUSION

Applicants appreciate the Examiner's careful review of the application. Applicants have now made an earnest effort to place this case in condition for allowance in light of the amendments and remarks set forth above. For the foregoing reasons, Applicants respectfully request reconsideration of the rejections and full allowance of pending claims as amended.

Applicants believe there are no fees due at this time; however, the Commissioner is hereby authorized to charge any fees necessary or credit any overpayment to Deposit Account No. 50-2148 of Baker Botts L.L.P.

If there are any matters concerning this Application that may be cleared up in a telephone conversation, please contact Applicants' attorney at 512.322.2689.

Respectfully submitted,
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Date: February 17, 2009

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